

EMPLOYER STATUS DETERMINATION NORTHERN RAIL CAR CORPORATION

This is a determination of the Railroad Retirement Board concerning the status of Northern Rail Car Corporation (NRCC) as an employer under the Railroad Retirement Act (RRA) and the (RUIA). NRCC has not previously been held to be an employer under the Acts.

Information about NRCC was furnished by Mr. Roger Schrieber, Executive Vice President of Finance. According to Mr. Schrieber, NRCC began operations on April 25, 1986. Mr. William Gardner is NRCC's owner and Chief Executive Officer. Both Mr. Gardner and Mr. Schrieber are also directors and principal officers of Wisconsin & Southern Railroad Co. (B.A. No. 3635), which has been held to be an employer under the RRA and the RUIA with service creditable from July 1, 1980 to date, and which is also owned by Mr. Gardner.

Mr. Schrieber has advised that NRCC has two operating divisions, one of which repairs and rebuilds passenger cars and the other which remanufactures wheel sets used by locomotives, freight cars and passenger cars. He stated that NRCC offers its products to the public at large and that the company has rebuilt passenger cars and sold wheel sets to public and private non-railroad corporations and public utilities.

Mr. Schrieber has stated that 2.2% of NRCC's business is associated with affiliated railroad companies; 51% with the rail industry in general; and 49% with non-railroad business. Mr. Schrieber has also stated that NRCC spends less than 2% of its time on business with Wisconsin & Southern Railroad, approximately 30% of its time on business with railroads, and approximately 70% of its time on business with non-railroad companies.

Section 1(a)(1) of the RRA defines the term "employer" to include:

- (i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of [the Interstate Commerce Act];

- (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of the subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *. [45 U.S.C. § 231(a)(1)(i) and (ii)].

Section 1 of the RUIA contains essentially the same definitions.

Section 202.5 of the Board's regulations provides that a company is under common control with a carrier whenever the control of such company is in the same person, persons, or companies as that by which the carrier is controlled. In this case, the same individual, William Gardner, owns NRCC and WSR, a rail carrier employer under the RRA and the RUIA. In addition, both Mr. Gardner and Mr. Schrieber are officers of both NRCC and WSR. It is therefore the opinion of the Board that NRCC has been under common control with a rail carrier employer since August 12, 1988, the date on which Mr. Gardner purchased WSR. The question then becomes whether NRCC is providing a service in connection with railroad transportation.

The facts in this case are virtually identical to those in Board Coverage Decision 93-79, In Re VMV Enterprises Incorporated. VMV did only a small portion of its work, amounting to 2.5% of its revenue, for the affiliated railroad although it performed a substantial amount of its work for the rail industry as a whole. Based on the low level of service for its rail affiliate, a majority of the Board found that VMV was not performing a service in connection with railroad transportation.

According to Mr. Schrieber, NRCC began operations on April 25, 1986, more than 2 years before Mr. Gardner purchased the Wisconsin & Southern In August 1988. Although a slight majority of NRCC's business (51%) is associated with the railroad industry in general, NRCC spends very little of its time (2%) on its business with the Wisconsin & Southern Railroad, the railroad with which it is under common control, and derives only 2.5% of its revenue from such work. Since very little of NRCC's services are provided the railroad with which it is under common control, a majority of the Board finds, consistent with its holding in VMV Enterprises, that NRCC does not provide service in connection with railroad

transportation within the meaning of the definition of employer set out in the RRA and the RUIA. NRCC is thus not an employer under those Acts.

Glen L. Bower

V. M. Speakman, Jr. (dissenting)

Jerome F. Kever

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